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10 USA Cycling, Inc. and Linda Buffetti

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 CORNEALIUS LOPES,

15 Plaintiff,

16 vs.

17 FREEMONT FREEWHEELER, et al.,

18 Defendants.

Case No.: C 07-6213 PJH

DEFENDANT USA CYCLING, INC.
AND LINDA BUFFETTI'S REPLY
BRIEF IN SUPPORT OF ITS MOTION
TO DISMISS PURSUANT TO
FRCP 12(b)(5)(6)

Date: June 25, 2008

Time: 9:00 a.m.

Courtroom: 3

Hon. Phyllis J. Hamilton

Complaint Filed: November 2, 2007

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20
21 **I. INTRODUCTION**

22 Plaintiff Cornelius Lopes' opposition to defendants USA Cycling, Inc.'s and Linda
23 Buffetti's Motion to Dismiss is indecipherable. Lopes does not make any cognizable
24 argument or submit any admissible evidence in support of the opposition.

25 As to Count 8 of the complaint, the only cause of action alleged against USA
26 Cycling, Lopes has failed to establish by admissible evidence that USA Cycling was
27 properly served with the complaint in the time and manner prescribed for service by the
28 Court. Lopes also fails to establish that Count 8 of the complaint is not barred by the

1 applicable statute of limitations or that the Count states facts on which relief can be
 2 granted. As USA Cycling was not properly served with the complaint and Count 8 of the
 3 complaint is barred by the statute of limitations, USA Cycling's motion to dismiss must
 4 be granted without leave to amend.

5 Similarly, as to Ms. Buffetti, Lopes' opposition utterly fails to explain how Count
 6 2 of the complaint states facts on which relief can be granted or establishes that Count 18
 7 of the complaint is not barred by the statute of limitations.

8 9 **II. COUNT 8 MUST BE DISMISSED AS TO USA CYCLING**

10 When a defendant files a motion to dismiss challenging the sufficiency of service
 11 of process, the plaintiff bears the burden of proving the adequacy of service. *Beati and*
 12 *Osborne LLP v Patriot Scientific Corp.* (SDNY 2006) 431 F.Supp.2d 367, 384.

13 Plaintiff's only argument concerning service of the complaint on USA Cycling
 14 appears at page 9 of the opposition where Lopes asserts that USA Cycling was served by
 15 service of defendant Linda Buffetti, "as she has the title USCF/NORBA promoter service
 16 coordinator." However, as explained in Ms. Buffetti's declaration in support of USA
 17 Cycling's motion, Ms. Buffetti is not an officer, director, managing agent or general
 18 agent of USA Cycling. Ms. Buffetti was not an agent authorized by appointment or by
 19 law to receive service of process on behalf of USA Cycling. As USA Cycling is a
 20 corporation and has not been served in compliance with Federal Rules of Civil Procedure,
 21 Rule 4(h)(1)(b), it has not been properly served with the summons and complaint in this
 22 action and Count 8 must be dismissed as to USA Cycling.

23 As to USA Cycling's contention that Count 8 is barred by the two year statute of
 24 limitations for Lopes' 42 U.S.C. Section 1985 claim, it is impossible to determine what if
 25 any argument Lopes makes in his opposition papers concerning the statute of limitations.
 26 Accordingly, as the statute of limitations for plaintiff's 42 U.S.C. section 1985(3) claim
 27 accrued on October 12, 2005, the date of the dismissal of the criminal action and the
 28

1 statue expired, at the latest, on October 12, 2007, this action which was not filed until
2 November 2, 2007, is barred by the statute of limitations.

3 Apparently, Lopes confusingly attempts to argue that Count 8 of the complaint
4 states a cause of action for violation of 42 U.S.C. Section 1985(3) because, allegedly, an
5 independent insurance adjuster investigated the bicycle race incident and provided
6 information to the Newark Police Department and the Alameda County District
7 Attorney's office. How these allegations are suppose to establish a violation of section
8 1985 by USA Cycling is incomprehensible. Lopes does not cite any authority to support
9 this proposition.

10 Count 8 of the complaint must be dismissed as to USA Cycling without leave to
11 amend. USA Cycling was not properly served with the summons and complaint, Count 8
12 is barred by the statute of limitations and Count 8 otherwise fails to state facts upon
13 which relief can be granted.

14 **III. COUNTS 2 AND 18 MUST BE DISMISSED AS TO DEFENDANT LINDA** 15 **BUFFETTI**

16 Count 2 of the complaint attempts to allege a civil conspiracy in violation of the
17 RICO statute, 18 U.S.C. Section 1962(d). Count 18 attempts to allege a cause of action
18 for malicious prosecution.

19 As to Count 2, plaintiff's opposition to Ms. Buffetti's motion to dismiss appears at
20 page 15 of Lopes' opposition. Section 1962(d) prohibits the act of conspiring to violate
21 Section 1962(a) or Section 1962(c). Section 1962(a) prohibits the investment or
22 improper use of money obtained from racketeering activity. Section 1962(c) prohibits
23 association with an "enterprise" engaged in racketeering activity. In order to plead a
24 Section 1962(c) violation, plaintiff must allege that Ms. Buffetti was associated with an
25 "enterprise" within the meaning of RICO. See, *Resolution Trust Corp. v. Keating* 186
26 F.3d 1110, 1117 (9th Cir. 1999). The definition of "enterprise" encompasses both groups
27 with a formal legal structure and those whose members merely associate in fact. See, 18
28 U.S.C. Section 1961(4). Either way, however, a group does not constitute an enterprise

1 unless it exist independently from the racketeering activity in which it engages. See,
2 *Chang v. Chen* 80 F.3d 1293, 1298 (9th Cir. 1996) (citing *United States v. Turkett* 452
3 U.S. 576, 583, 101 Sp. Ct. 2524, 69 L.Ed. 2d 246 (1981) at minimum, it must have “some
4 sort of structure . . . for the making of decisions” and “some mechanisms for controlling
5 and directing the affairs of the group on an ongoing, rather than an ad hoc, bases” *Id.* at
6 1299 (internal quotations omitted). A group whose members collectively engage in an
7 illegal act, in and of itself, does not constitute an “enterprise” for purposes of RICO. *Id.* at
8 1300.

9 Lopes argues that Ms. Buffetti, in her capacity as an hourly employee of USA
10 Cycling, participated in a conspiracy to commit fraud in violation of 18 U.S.C.
11 Section 1982(d) by advising defendant Jason Sage of insurance applicable to the cycling
12 event and by allegedly providing information to the Newark Police Department and
13 police officer Joseph Wren. Lopes does not explain in his opposition or the complaint
14 what supposed fraud occurred, the existence of a RICO enterprise, or how he was harmed
15 by Ms. Buffetti’s conduct.

16 Plaintiff has simply not alleged a cause of action for violation of 18 U.S.C. Section
17 1962(d) and, given the admitted facts in this case, he cannot do so.

18 As to Count 18 of the complaint, apparently, an attempt to allege a cause of action
19 for malicious prosecution, Lopes’ opposition contains no argument concerning this
20 Count. As discussed in Ms. Buffetti’s motion to dismiss, a cause of action for malicious
21 prosecution is barred by the statute of limitations and the Count does not state a claim
22 upon which relief may be granted.

23 The criminal charges against Lopes were dismissed on October 12, 2005 and any
24 malicious prosecution cause of action accrued on that date. The statute of limitation for
25 malicious prosecution is two years. *Stavropoulos v. Superior Court* (2006) 141
26 Cal.App.4th 190, 193-194. The statute of limitations expired on October 12, 2007. Since
27 over two years passed from the dismissal of the criminal charges against Lopes and the
28

1 filing of this action on November 2, 2007, the statute of limitations bars this claim against
2 Ms. Buffetti.

3 In plaintiff's previous federal action the Court specifically found that the district
4 attorney had probable cause to file criminal charges against Lopes. (June 25, 2007
5 memorandum and/or page 6, Exhibit C to RJN). There are no allegations or evidence
6 that Ms. Buffetti was in any way connected with the prosecution of the plaintiff. Lopes
7 has failed to state, and will never be able to truthfully allege or prove a cause of action for
8 malicious prosecution against Ms. Buffetti.

9 **IV. CONCLUSION**

10 The summons and complaint in this action were never properly or timely served
11 on USA Cycling. The only Count alleged against USA Cycling, Count 8, is barred by the
12 applicable statute of limitations and fails to state facts on which relief may be granted.
13 As to Linda Buffetti, Count 2 of the complaint fails to state facts upon which relief can be
14 granted and Count 18 is barred by the applicable statute of limitations and fails to state
15 facts on which relief can be granted. This action must be dismissed without leave to
16 amend as to USA Cycling and Linda Buffetti.

17
18 DATED: June 25, 2008

HINSHAW & CULBERTSON LLP

19
20
21 By: 

22 David I. Dalby
23 Attorneys for Defendants
24 USA Cycling, Inc. and Linda Buffetti

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PROOF OF SERVICE

[I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within actions; my business address is One California Street, 18th Floor, San Francisco, CA 94111.

On June 25, 2008, I served the document(s) entitled:

**DEFENDANTS USA CYCLING AND LINDA BUFFETTI REPLY
BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT
TO FRCP 12(b)(5)(6)**

on the interested parties in this action by placing true copies thereof enclosed in a sealed envelope(s) addressed as stated below:

☒ **(BY MAIL):** I deposited such envelope in the mail at San Francisco, California. The envelope was mailed with postage fully prepaid. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ **(BY FACSIMILE TRANSMISSION):** I caused a true copy thereof from sending facsimile machine telephone number 415-834-9070 to be sent via facsimile to the above listed names and facsimile numbers and received confirmed transmission reports indicating that this document was successfully transmitted to the parties named above.

☐ **(VIA OVERNIGHT MAIL):** I deposit such envelope to be placed for collection and handling via UPS following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for UPS. On the same day that material is placed for collection, it is picked by UPS at San Francisco, California.

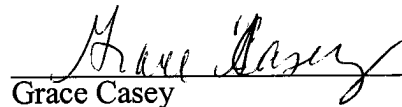
☐ **(BY HAND DELIVERY):** I delivered by hand each sealed envelope to the addressee(s) mentioned in the attached service/ mailing list.

☐ **(BY ELECTRONIC TRANSFER:)** I caused such document(s) to be electronically served to the parties on the Service List maintained on Pacer's Website for this case.

Plaintiff in Pro Per:

Cornelius Lopes
6251 Quartz Place
Newark, CA 94560

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on June 25, 2008, at San Francisco, California.


Grace Casey